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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 325

MAY R. KIEFERDORF,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

May R. Kieferdorf petitions that a writ of certiorari issue to review the decision and decree of the United States Circuit Court of Appeals for the Ninth Circuit in the cause numbered and entitled 10,484, May R.

Kieferdorf, Petitioner, v. Commissioner of Internal Revenue, Respondent, said decision being made and filed on May 6, 1944. (R. 51.) Said decision and decree affirmed a prior determination by the Tax Court of the United States promulgated on March 16, 1943. (R. 20.) A petition for a rehearing before the United States Circuit Court of Appeals for the Ninth Circuit was denied June 2, 1944. (R. 60.)

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner's husband, W. J. Kieferdorf (hereinafter referred to as decedent) was a resident of San Francisco, California, and died testate December 3, 1939, being survived by his widow, the petitioner herein, and two minor children.[1] In March, 1940, the executor of the estate of the decedent filed an income tax return reporting the income received by decedent during 1939. The tax shown to be due on such return was $557.31, which amount is not disputed. This tax was not paid by the executor.

In the probate proceedings petitioner petitioned for and was granted certain payments from the estate as a family allowance under the provisions of Section 680 of the Probate Code of the State of California. Petitioner also petitioned for and obtained a judgment

[1]The facts were stipulated to before the Tax Court and are found in the Record at pages 16 to 20 inclusive.

setting aside to her certain proceeds of insurance policies as property exempt from execution under the provisions of Section 660 of the Probate Code of the State of California.[2]

The Commissioner of Internal Revenue assessed the income tax liability of the decedent against petitioner as a transferee under the provisions of Section 311 of the Internal Revenue Code.[2] (26 USCA 311; R. 13.)

The assessment was contested before the Tax Court of the United States and that Court held that no transferee liability was incurred because of the payment of the family allowance, but that transferee liability resulted from the setting aside to petitioner from the estate the property therein exempt from execution. (R. 21-31.) Two judges of the Tax Court (including the judge who tried the case) dissented, holding that neither the payment of family allowance, nor the obtaining of a judgment setting aside the exempt property, created any transferee liability. (R. 32-38, inclusive.) A petition for review of the determination of the Tax Court was filed in the United States Circuit Court of Appeals for the Ninth Circuit and the latter Court affirmed the determination of the Tax Court. (R. 51-59, inclusive.)

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[2]This and other statutory provisions concerned are set forth in the Appendix to the Brief in support of this Petition filed herewith.

II.

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

(a) Nature of the case and statutory provisions supporting jurisdiction.

This case is concerned with whether under the facts petitioner incurred a transferee liability enforceable under Section 311 of the Internal Revenue Code. Such liability was found to exist in the decision promulgated by the Tax Court of the United States, which decision, upon petition for review, was affirmed by the Circuit Court of Appeals on May 6, 1944; rehearing denied June 2, 1944. The majority opinion of the Tax Court is found in the Record at pages 20 to 31, inclusive; the dissenting opinion is found at pages 32 to 38. The determination of the Circuit Court of Appeals is found in the Record at pages 51 to 58.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 USCA 347(a)) and petitioner also relies upon Rule 38, paragraph 5(b) of this Court, and upon Section 1008 Revised Statutes (28 USCA 350.)

(b) Cases believed to sustain jurisdiction.

Phillips v. Commissioner of Internal Revenue, (1931), 283 U.S. 589;

Hulburd v. Commissioner of Internal Revenue, (1935), 296 U.S. 300.

(c) Grounds upon which it is contended that the questions involved are substantial.

It is the first contention of petitioner that she was not a transferee or distributee within the meaning of these words as used in Section 311 of the Internal Revenue Code and thus in no way could sustain transferee liability. A substantial question of law exists as to the meaning of these words as used in the statute in question.

Petitioner's principal contention is that, assuming for the purposes of argument that she might be deemed a transferee or distributee within the meaning of Section 311, *transferee liability* is determined by state law. Under California law no transferee liability was incurred, and thus petitioner was not liable for income taxes due from the estate or for any other debt of the estate. Petitioner merely exercised certain statutory rights which transferred title to certain property from the estate to her. A substantial question of law arises in relation to a conflict between federal tax legislation and state property rights. This conflict has been mentioned by this Court, but not resolved in relation to the particular statute in question. In *Phillips v. Commissioner of Internal Revenue* (1931), 283 U.S. 589, 602, this Court said:

> "We have, therefore, no occasion to decide whether the right of the United States to follow transferred assets is limited by any State laws."

The questions involved are also substantial in that they relate to social legislation passed by States for the protection of widows and orphans. For the pro-

tection of this class of persons the State has created certain property rights; this is deemed of benefit to the welfare of the State and its citizens as a whole. This case presents the substantial question of whether this policy of the State acting within its proper sphere may be destroyed by the Federal Government in the collection of taxes.

III.

THE QUESTIONS PRESENTED.

The two principal questions of law presented in this petition are as follows:

(a) Was petitioner a transferee or distributee as these words are used in Section 311 of the Internal Revenue Code?

(b) Assuming that petitioner was a transferee within the meaning of Section 311 of the Internal Revenue Code, is it possible for her to incur income tax liability as to the tax of another where under State law no transferee liability was incurred?

A third question is concerned with the operation of Section 1119 of the Internal Revenue Code (28 USCA 1119) which places on the Commissioner of Internal Revenue the burden of showing transferee liability. It is contended that this burden has not been sustained in this case.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. Practically every State in the Union has legislation similar to that involved in this proceeding. Such legislation provides that a widow or minors may obtain from the estate of a deceased husband or father certain property. Such property is taken free and clear from the claims of creditors of the estate. Such creditors would normally include the United States, although in the particular case the Circuit Court of Appeals held to the contrary. Petitioner presents a situation which is bound to occur in many jurisdictions and it is essential to the orderly administration of justice and the efficient operation of the federal tax system that this Court resolve the conflict which here exists between federal power and state property law.

In deciding the case here presented the Circuit Court of Appeals is in conflict with the decisions in other circuits which hold that under Section 311 of the Internal Revenue Code, transferee liability is determined by State law.[3] Under California law petitioner incurred no transferee liability,[4] but, nevertheless, the Circuit Court of Appeals found her to be

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[3] *Harwood v. Eaton* (1933), 68 Fed. (2d) 12; *Botz v. Helvering* (1943), 134 Fed. (2d) 538.

[4] *Estate of Pillsbury* (1917), 175 Cal. 454, 166 Pac. 11; *Estate of Crosby* (1935), 2 Cal. (2d) 470, 41 Pac. (2d) 928.

liable for the tax of another. It is essential that this conflict in the decisions of the Circuit Courts should be resolved.

V.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court on a date certain, to be therein designated, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court "10,484, May R. Kieferdorf, Petitioner, v. Commissioner of Internal Revenue, Respondent," to the ends that said cause may be reviewed by this Court as provided by law, that said judgment of said Circuit Court of Appeals be reversed and that your petitioner have such other and further relief in the premises as may seem just.

Dated, San Francisco, California,
July 31, 1944.

G. D. SCHILLING,
Attorney for Petitioner.

KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, is in the opinion of the undersigned attorney for petitioner well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
July 31, 1944.

G. D. SCHILLING,
Attorney for Petitioner.